The Failure to Pursue the Mandates of International Organizations in the Midst of the COVID-19 Pandemic

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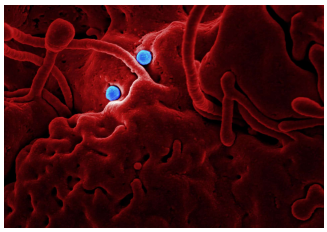

This blogpost is a reaction to the last episode of EJIL: The Podcast!, in which the brilliant discussion on the role of the World Health Organization (WHO) in the pandemic ended up with the perennial question of accountability. As contended by Gian Luca Burci, the COVID-19 pandemic has shown once again that international organizations are ideal scapegoats. Whether it be the delays of the WHO, the 'missing in action' Security Council or the lack of solidarity by the European Union, national governments and local politicians find in international organizations an ideal pressure relief valve for the malcontent of their electorates. In general, the absence of clarity on the relevant primary obligations makes the issue of accountability extremely abstract, mainly because the discussion lacks the reference to the legal standards that the organization has to respect. The United States, for instance, accused the WHO of failing "in its basic duty" and sent a letter to its Director-General with serious accusations, but without identifying relevant primary obligations that would have been violated by the organization.

I would like to discuss the topic further by giving content to the legal meaning of blaming international organizations for failing to pursue their mandates. In the next two sections I will discuss whether the mandate imposes legal obligations and what it means to demand accountability for a failure.

Is the Mandate Mandatory?

The United Nations (UN) inaction in the face of the Rwandan Genocide is probably the most famous precedent in which an international organization has been accused of failing its mandate. Despite a commonly held sentiment that the UN did wrong in refraining from intervention, it is actually very difficult to claim that it violated an international obligation. The UN is not part to relevant treaties such as the 1948 Genocide Convention and it is not clear whether it is bound as a matter of customary law. Indeed, despite the classical finding by the International Court of Justice (ICJ) in the Advisory Opinion on the WHO Headquarter Agreement (at para 37) that organizations are bounded by general rules of international law, several reasons (at 22) impede an abstract application of the same customary norms binding states. A general obligation binding all subjects of international law does not reflect the differences between the competence of the UN to deal with the Rwandan crisis and, let's say, the competence of the International Commission for the Conservation of Atlantic Tunas. One could even claim that any attempt of the latter to prevent a genocide would be *ultra vires* because in violation of its competences. In the

absence of clear legal standards, the mandate is potentially relevant to establish the primary obligations binding on international organizations. However, in the majority of cases mandates do not explicitly set up obligations.

Indeed, mandates are typically written in the form “the purposes of the organization are” and not in the form “the organization shall”. They have a peculiar legal nature, because they are the object of treaties between states and, at the same time, the constitutional aims of independent subjects of international law. Indeed, as the ICJ has contended in its Advisory Opinion on Nuclear Weapons, the UN Charter is as much a treaty than a Constitution (para 19). As treaties, mandates written in non-binding forms do not impose obligations, except for those that concern the object of a treaty as included in the 1969 Vienna Convention. As constitutions, mandates written in non-binding forms are programmatic norms that need to be specified in the attribution of competences to be valuable legal standards to hold organizations and their member states accountable for their failures.

For instance, does the UN purpose to maintain peace and security create a legal obligation for the UN to act before the COVID-19 pandemic? Can we claim that a mismanagement of the pandemic by the WHO would trigger its responsibility for failing its objective concerning “the attainment by all peoples of the highest possible level of health”? In both cases, the wording of the UN Charter and of the WHO Constitution does not express an obligation. In order to identify obligations, we have to look at specific competences and subsequent rules. For instance, article 39 of the UN Charter and article 12 of the IHR oblige the Security Council and the WHO Director-General to make a determination and to act accordingly.

The relationship between the mandates and the obligations to purse them is well exemplified by article 3 of the Treaty on European Union. Paragraph one does not establish an obligation by describing that “The Union’s aim is to promote peace, its values and the well-being of its peoples”. However, obligations are included in paragraph six, which imposes the EU “to purse its objectives by appropriate means commensurate with the competences”.

The content of the WHO mandate to attain “the highest possible level of health” means that the WHO Director-General has the duty to declare a public health emergency because it is her competence under the IHR. Conversely, it does not cover all those activities that are not mentioned in attributed competences. For instance, it does not mean that the WHO has a duty to issue medical degrees and qualify doctors. It could be useful to achieve the mandate, but it has no competence on issuing medical qualifications. As the object of the treaty, mandates play a fundamental role for the interpretation of the competences and the obligations to act in specific circumstances.

What is a failure to pursue the mandate?

The failure to pursue the mandate can take two forms: First, a wrong determination of the duty to act in a specific circumstance and, second, a wrong employment of the competences which causes ineffective or wrongful actions. For instance, it could involve a wrong determination on whether to declare a public health emergency of international concern or detrimental recommendations issued to tackle it.

In both cases, it might be difficult to assess responsibility because the organization itself decides whether the situation triggers its duty to act and establishes the measures that fulfil it. Again, it depends on the wording of the constitutive instrument and subsequent rules. The Security Council has a duty to take actions once the COVID-19 pandemic becomes a threat to the peace, but, under the UN Charter it has a vast discretion on that determination, which involves political evaluation (para 39). Conversely, the WHO Director-General is obliged to take into consideration technical criteria and to follow an established procedure to make the determination of public health emergencies under article 12 IHR, which should make accountability more effective.

Moreover, failures can take the form of both actions and inactions. A Security Council debate ending with a negative decision could be enough to claim that the UN properly exercised its duty to act. Conversely, inadequate recommendations issued by the WHO to tackle an outbreak could constitute a violation of the WHO duty to act as much as omissions. Actually, it is difficult to distinguish between actions and inactions in the context of international organizations, because it is possible to find a certain level of activity in almost every circumstance. For instance, the decision not to authorize a military mission after a long and lacerating debate within the Security Council cannot be easily called an omission, while the absence of any debate certainly is. Concerning the COVID-19 pandemic, the Security Council standstill can be either considered as an omission to use its powers or as a decision not to use them, after actions took place in closed-door debate.

Finally, the failure to pursue the mandate does not concern the organization only, but also its member states. Despite their separate legal personalities, the institutional relationship entangles them and the conferment of the mandate to the autonomous entity does not free member states from relevant obligations. Among all, the respect of budgetary obligations is clearly fundamental to allow the organization to pursue its objectives. In terms of normative quality, there is no difference between the obligation to fund the WHO and the obligation to notify the events that may constitute a public health emergency of international concern. In particular, institutional obligations cannot be qualified as exclusively international or as exclusively institutional as debated in the podcast. Indeed, they possess both characteristics derived from the dual nature of constitutive instruments, as the ICJ contended in the context of the Kosovo Advisory Opinion referring to Security Council Resolutions (paras 88-89).

Besides obligations that can be found in constitutive treaties, member states are tied to the pursuit of the mandate by membership obligations that are established in general international law. Their existence is way more controversial, but nonetheless considered by authoritative institutions. At the very least, member states are obliged to put the

organization in the condition to fulfil its treaty obligations, as the Institut de Droit International contended (at 284). Similarly, the International Law Commission established in article 40 ARIO that member states shall take all relevant measures to enable the organization to fulfil its obligations of reparation. These obligations give a meaning to the institutional relationship and show how the failure to pursue the mandate is not a concern of the organization only.